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Office of Administrative Law Judges
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**Issue Date: 10 January 2005**

Case No. 2003-BLA-6685

In the Matter of

EARL SALYERS, JR.,

Claimant,

v.

SHAMROCK COAL CO., INC.,

Employer,

and

JAMES RIVER COAL CO.,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES:[1]

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[1] The Director, Office of Workers' Compensation Programs, a party in this proceeding, was not present or represented by counsel at the hearing. By failing to appear at the hearing or to have participated in any manner in this case after its referral to this office, the Director is deemed to have waived any issues which it could have raised at any stage prior to the close of this record. By referring this matter for hearing the Director is further deemed to have completed evidentiary development and adjudication as required by the regulations. 20 C.F.R. § 725.421.

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For the Claimant

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For the Employer

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

**DECISION AND ORDER - DENIAL OF BENEFITS**

This case arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977 (hereinafter referred to as "the Act"), 30 U.S.C. § 901 *et seq.*, and the regulations issued thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

On September 23, 2003, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a hearing. (DX 50).[2] A formal hearing in this matter was conducted on September 15, 2004, in London, Kentucky, by the undersigned. All parties were afforded full opportunity to present evidence as provided in the Act and the regulations issued thereunder. The opinion which follows is based on all relevant evidence of record.

[2] In this Decision and Order, "DX" refers to the Director's exhibits, "EX" refers to the Employer's exhibits, "CX" refers to the Claimant's exhibits, and "TR" refers to the transcript of the hearing.

## ISSUES[3]

The issues in this case are:

1. Whether the claim was timely filed;

2. Whether the Claimant has pneumoconiosis as defined in the Act and regulations;

3. Whether the Claimant's pneumoconiosis arose out of coal mine employment;

4. Whether the Claimant is totally disabled; and,

5. Whether the Claimant's disability is due to pneumoconiosis.

(DX 50).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background:

The Claimant, Earl Saylers, Jr., was born on February 27, 1938 and has a second grade education. (TR 13-14; DX 6). He alleges one dependent for the purposes of augmentation, namely his wife, Vermell Saylers. (TR 13; DX 6).

At the hearing, the Claimant stipulated to twenty-six years of coal mine employment and testified that all of his work was underground. (TR 11, 14). He stated he worked as a repairman on miners, shuttle cars, and bolt machines inside the face of the mine. (TR 15, 20). The Claimant testified that his job entailed heavy lifting, carrying, pushing, and pulling as well as other various hard manual type work. (TR 15). He stated that during

[3] The parties stipulated to the Claimant being a miner, post-1969 coal mine employment, one dependent, and the named Employer as the responsible operator. (TR 10). The Employer also stipulated to seventeen years of coal mine employment while the Claimant stipulated to twenty-six years. (TR 10-11).

his entire coal mine employment he was constantly exposed to significant amounts of coal dust. (TR 14-15). The Claimant testified at his deposition to experiencing breathing problems at the end of his coal mine work as well as heart and back problems. (DX 15-16). The Claimant stated he received Social Security Disability benefits for these three conditions. (TR 16).

The Claimant is seen by Dr. Vaezy in Corbin, Kentucky. (TR 17). He is prescribed inhalers for his breathing problems. Id. The Claimant complains of exhaustion, shortness of breath, and smothering. (TR 17-19). His breathing problems are exacerbated by elevated activity. (TR 18). He stated that he has difficulty sleeping due to smothering and wakes up about three or four times a night. Id. The Claimant testified to using three pillows to sleep. Id. He also stated that dust, gases, fumes, and smoke aggravate his breathing problems. (TR 19).

The Claimant is a former smoker. (TR 17). He testified to smoking three years and quitting seventeen years ago. Id. He did not state a smoking rate. Having determined the Claimant to be a credible witness, I find he had a smoking history of three years at an undeterminable rate, having quit over seventeen years ago.

The Claimant filed his first application for benefits on November 17, 1972. (DX 1). The claim was denied by the Office of Workers' Compensation Programs, and after a request for reconsideration, the Director again issued a denial of benefits on February 22, 1980. Id. That decision became final when the Claimant did not request a formal hearing within the requisite time period. See § 725.419(d). The Claimant filed his second application for benefits on October 7, 1986. (DX 2). The District Director issued a denial of benefits on August 1, 1988. Id. The Claimant requested a formal hearing; however, it appears the appeal was never pursued. Id. The Claimant's third claim was filed on May 27, 1992. (DX 3). The District Director denied the Claimant benefits on November 5, 1992. Id. The decision became final when the Claimant did not request a formal hearing within the requisite time period. See § 725.419(d). The current application for benefits was filed on May 24, 2002. (DX 6). The District Director issued a Proposed Decision and Order denying benefits on July 11, 2003. (DX 45). This matter was transferred to this office after the Claimant submitted a request for a formal hearing conducted by an Administrative Law Judge. (DX 46, 50).

Length of Coal Mine Employment:

The Claimant stipulated to twenty-six years of coal mine work. (TR 11). The Employer stipulated to seventeen years. (TR 10). The District Director made a finding of twenty-six plus years. (DX 46). The documentary evidence of record includes the Claimant's Social Security earnings record, W-2 forms, and pay stubs. (DX 9-12). Accordingly, I find that the Claimant was a coal miner, as that term is defined by the Act and Regulations, for a period of at least twenty-six years. He last worked in the Nation's coal mines in 1986. (DX 12).[4]

Dependency:

The Claimant alleges one dependent for purposes of augmentation, namely his wife, Vermell Salyers, whom he married on March 2, 1957. (DX 6, 14; TR 13). Therefore, I find that he has one dependent for purposes of benefit augmentation.

Timeliness:

Under section 725.308(a), a claim of a living miner is timely if it is filed within three years after a medical determination of total disability due to pneumoconiosis has been communicated to the miner. Section 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed.

The Sixth Circuit, in Sharondale Corp. v. Ross, 42 F.3d 993 (6th Cir. 1994), held that the time period in which a miner must file for benefits, under § 725.308(a), starts after each denial of a previous claim, provided that the miner works in the coal mines for a substantial period of time after the denial and a new medical opinion of total disability due to pneumoconiosis is communicated. Sharondale, 42 F.3d at 996. In that case, the claimant, Ross, was initially denied benefits under the Act in 1981, and he began working again as a coal miner before quitting in 1983. In 1985, he filed a duplicate claim, and the Sixth

[4] Appellate jurisdiction with a federal circuit court of appeals lies in the circuit where the miner last engaged in coal mine employment, regardless of the location of the responsible operator. Shupe v. Director, OWCP, 12 B.L.R. 1-200 (1989)(en banc). As the Claimant's last coal mine employment was in the Commonwealth of Kentucky, the law of the Sixth Circuit of Appeals governs. (DX 12).

Circuit found that that claim was timely filed. The court explicitly declined to hold that the statute of limitations only applied to the filing of initial claims. Id. The Sixth Circuit holding was dictated by the progressive nature of pneumoconiosis and logic, as it would be unfair to allow serial applications for benefits and then limit the claimant's ability to do so to three years. Id.

The Sixth Circuit again addressed the application of § 725.308 in Tennessee Consolidated Coal Co. v. Kirk, 264 F.3d 602 (6th Cir. 2001). After three of the Claimant's requests for benefit were denied, Kirk's fourth subsequent claim was awarded. Kirk, 264 F.3d at 604. The Sixth Circuit found that Kirk's last claim was timely filed, stating:

> [t]he three-year statute of limitations clock begins to tick the first time that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to Sharondale, the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination, like Kirk's 1979, 1985, and 1988 claims, and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed 'premature' because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period.

Id. at 608.

Furthermore, the Sixth Circuit stated that Kirk's three prior denials did not trigger the statute of limitations because they were premature filings, noting that previous medical opinions did not conclusively opine that Kirk was totally disabled due to pneumoconiosis. Then the Court referenced its unpublished decision in Clark v. Karst-Robbins Coal Co., No. 93-4173, 1994 WL 709288 (6th Cir. 1994), where it rejected a successful state workers' compensation claim that relied upon a finding that the claimant became permanently and totally disabled as the result of the occupational disease of pneumoconiosis as a "medical determination."

The issue was revisited by the Sixth Circuit again in the unpublished decision of Peabody Coal Co. v. Director, OWCP [Dukes], 48 Fed.Appx. 140, 2002 WL 31205502 (6th Cir. October 2, 2002)(unpublished). In this case, the Claimant received several physician diagnoses of pneumoconiosis, and filed a claim in 1988 which was subsequently denied. Having not returned to coal mine employment, the claimant filed a duplicate claim in 1995 and was awarded benefits. The Sixth Circuit engaged in a thorough and complete analysis of the three-year statute of limitations, wherein they characterized their holding in Kirk as a finding that no "medical determination" exists absent a valid medical opinion, notwithstanding prior knowledge or existence of the disease. Dukes, 48 Fed.Appx. at 144. In reliance on Kirk and paying deference to the remedial intent of Congress in creating the Act, the court held that the three-year statute of limitations applies to subsequent claims. Id. at 145.

Next, the Sixth Circuit stated that the three-year statute of limitations is not triggered by undiagnosed cases of pneumoconiosis, self-diagnosed cases, and (relying on Sharondale) "all situations in which the miner has filed a claim but has not yet contracted the disease - including claims filed on the basis of a misdiagnosis." Id. In light of the denial of Dukes' 1988 claim, the Sixth Circuit found, for legal purposes, that Duke's condition was misdiagnosed. The Sixth Circuit then agreed with and adopted the reasoning behind the Tenth Circuit Court of Appeals' decision that a "final finding by an Office of Workers' Compensation Program adjudicator that the claimant is not totally disabled due to pneumoconiosis repudiates any earlier medical determination to the contrary and renders prior medical advice to the contrary ineffective to trigger the running of the statute of limitations." Id. (citing Wyoming Fuel Co. v. Director, OWCP [Brandolino], 90 F.3d 1502, 1507 (10th Cir. 1996)). The Sixth Circuit stated that a misdiagnosis does not equate to a medical determination. Dukes, 48 Fed.Appx. at 146. In a restatement of the holding, the Sixth Circuit declared, "if a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitations purposes." Id. Effectively, a "proper medical determination" is required to trigger the statute of limitations. Id.

After the Sixth Circuit determined that a misdiagnosis does not trigger the statute of limitations, the apparent conflict with its holding in Kirk was addressed.

In Kirk, the court stated in dicta that:

> Medically supported claims, even if ultimately deemed 'premature' because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.
>
> However, we decided Kirk on the basis that the miner there did not have a medically supported claim. Today, we have carefully considered this issue and hold otherwise.

Id.

The Board, however, has addressed this issue. In Furgerson v. Jericol Mining, Inc., BRB Nos. 03-0798 BLA and BLA-A (Sept. 20, 2004), the Board vacated the Administrative Law Judge's finding that a physician's opinion did not commence the running of the limitations period at § 725.308 after applying Dukes. The Board held that it was improper for the Administrative Law Judge to apply the Dukes holding, "the statute of limitations is not triggered by a medical determination submitted in conjunction with a claim that is ultimately denied as that opinion would be in error." Rather, the Board concluded that the published panel decision in Kirk was controlling and it directed that "the administrative law judge must determine if (the physician) rendered a well-reasoned diagnosis of total disability due to pneumoconiosis such that his report constitutes a 'medical determination of total disability due to pneumoconiosis which has been communicated to the miner'" under §725.308 of the regulations.

Considering the facts of the current claim, in his deposition, the Claimant stated initially that he was told by doctors that he was totally disabled from working in coal mines. (TR 24). In clarification of that testimony, the Claimant stated that he was told by one doctor that he was totally disabled due

to his lung condition. (TR 25-26). He testified that he received this communication immediately following the end of his coal mine employment and the filing of his state claim which would have been in 1986. (TR 26; DX 12). However, the Claimant never testified as to which doctor informed him of such a diagnosis.

The Claimant's hearing testimony establishes that a diagnosis of total disability due to pneumoconiosis was articulated to Mr. Salyers. The conflict with the regulations, however, arises when trying to prove a medical diagnosis of total disability due to pneumoconiosis within three years of filing the instant claim.

The alleged 1986 diagnosis of total disability due to pneumoconiosis by an unnamed doctor would fall sixteen years prior to the instant claim, and thus would violate the regulatory requirements. However, this diagnosis creates a problem. There is no evidence of which doctor conveyed this determination to the Claimant. As required under Furgerson, the Board held that an administrative law judge must determine if the physician who communicated total disability due to pneumoconiosis to the miner rendered a well-reasoned diagnosis. Without knowing which doctor made the finding, his or her report cannot be examined to determine if it is well-reasoned.

In conclusion, despite the Claimant's testimony that a diagnosis of total disability was communicated to him more than three years prior to the filing of the instant claim, I find this claim is timely. I find that the Employer has failed to rebut the presumption of timeliness, and therefore, this claim will not be dismissed because of a failure to meet the requirements of subsection 308(a).

Applicable Regulations:

Because this claim was filed after March 31, 1980, the effective date of Part 718, it must be adjudicated under those regulations. Amendments to the Part 718 regulations became effective on January 19, 2001. As this claim was filed on May 24, 2002, such amendments are applicable.

The 2001 amendments significantly limit the development of medical evidence in black lung claims. The regulations provide that claimants are limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy, and two medical reports as affirmative proof of their

entitlement to benefits under the Act. § 725.414(a)(2)(i). Any chest x-ray interpretations, pulmonary function test results, arterial blood gas study results, autopsy reports, biopsy reports and physician opinions that appear in a single medical report must comply individually with the evidentiary limitations. Id. In rebuttal to evidence propounded by an opposing party, a claimant may introduce no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, biopsy or autopsy. § 725.414(a)(2)(ii). Likewise, employers and the District Director are subject to identical limitations on affirmative and rebuttal evidence. § 725.414(a)(3)(i, iii).

Subsequent Claim:

In cases where a claimant files more than one claim and the earlier claim is denied, the later claim must also be denied on the grounds of the earlier denial unless there has been a material change in condition or the later claim is a request for a modification. Section 725.309(d). The Claimant's previous request was a subsequent claim for benefits which was denied by the District Director on November 5, 1992. (DX 3). The decision became final when the Claimant did not request a formal hearing within the requisite time period. See § 725.419(d). The current claim was filed on May 24, 2002, not within one year of the prior denial, so that it cannot be construed as a modification proceeding pursuant to Section 725.310(a). Therefore, according to Section 725.309(d) this claim must be denied on the basis of the prior denial unless there has been a material change in condition.

Section 725.309(d) provides that a subsequent claim must be denied unless the Claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. The applicable conditions of entitlement are limited to those conditions upon which the prior denial was based. § 725.309(d)(2). If the Claimant establishes the existence of one of these conditions, he has demonstrated, as a matter of law, a material change. If he is successful in establishing a material change, then all of the record evidence must be reviewed to determine whether he is entitled to benefits.

The previous claim was denied when it was determined that the Claimant failed to establish the existence of pneumoconiosis, total disability, and pneumoconiosis arising therefrom. (DX 3). Accordingly, the newly submitted medical

evidence will be reviewed in order to determine whether there has been a material change in condition.

Pneumoconiosis:

Section 718.202(a) sets forth four alternate methods for determining the existence of pneumoconiosis. Pursuant to Section 718.202, the Miner can demonstrate pneumoconiosis by means of 1) x-rays interpreted as positive for the disease, or 2) biopsy or autopsy evidence, or 3) the presumptions described in Sections 718.304, 718.305, or 718.306, if found to be applicable, or 4) a reasoned medical opinion which concludes the presence of the disease, if the opinion is based on objective medical evidence such as pulmonary function studies, arterial blood gas tests, physical examinations, and medical and work histories.

Under Section 718.202(a)(1), a finding of the presence of pneumoconiosis may be based upon a chest x-ray conducted and classified in accordance with Section 718.102. To establish the existence of pneumoconiosis, a chest x-ray must be classified as category 1, 2, 3, A, B, or C, according to the ILO-U/C classification system. A chest x-ray classified as category 0, including subcategories 0/1, 0/0, or 0/-, does not constitute evidence of pneumoconiosis.

The newly submitted evidence consists of three x-rays with six readings. An x-ray dated August 13, 2002 was interpreted as positive for pneumoconiosis with a 1/1 profusion by Dr. Simpao, who has no special radiological qualifications. (DX 15). Dr. Simpao also indicated cor pulmonale – sternostomy wire and abnormality of cardiac size and shape. In addition, this x-ray was re-read by Dr. Barnett on the same day, and he noted cor pulmonale. (DX 12). Dr. Barnett is board-certified and a B-reader.[5] Again, Dr. Barnett on May 22, 2003 interpreted this x-

[5] A B-reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the United States Department of Health and Human Services. 42 C.F.R. § 37.51. The qualifications of physicians are a matter of public record at the National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. Because B-readers are deemed to have more training and greater expertise in the area of x-ray interpretation for pneumoconiosis, their findings may be given

ray. (EX 9-10). He found no existence of pneumoconiosis, but did indicate cardiomegaly, post-coronary artery bypass graft procedure, chronic obstructive pulmonary disease, chronic bronchitis, and extra pleural fat. In his deposition, he testified to the same. (EX 6).

A November 21, 2002 x-ray was interpreted as negative for pneumoconiosis by Dr. Dahhan. (EX 2). He noted cor pulmonale and cardiac enlargement with post-mediastinotomy changes. Dr. Dahhan is a B-reader, and reiterated these findings at his deposition. (EX 4, 12).

Dr. Rosenberg, a B-reader, interpreted an x-ray dated February 18, 2004 as negative for pneumoconiosis. (EX 1, 3). He indicated in his report emphysema, cor pulmonale, and pleural plaques that were consistent with pneumoconiosis; however, his notes stated "while pleural changes could be related to past asbestos exposure, suspect post-op in etiology." Additionally, the x-ray was interpreted by Dr. Alexander on July 26, 2004 as positive for pneumoconiosis. (CX 1-2). His report also included findings of cor pulmonale, cardiac enlargement with changes of prior coronary artery bypass graft surgery, and bilateral circumscribed in profile chest wall pleural thickening. Dr. Alexander is board-certified and a B-reader. In a rehabilitative report dated August 20, 2004, Dr. Rosenberg stated "the diminished contrast of the film can sometimes be erroneously interpreted as demonstrating parenchymal changes that are not really present." (EX 11). He also opined that there were no micronodules present that were related to coal dust. Moreover, Dr. Rosenberg wrote that his B-reading was of the original x-ray, and his findings remained unchanged, the Claimant does not have pneumoconiosis.

Upon careful review of the x-ray evidence of record, I find that the preponderance of negative readings by B-readers and board-certified radiologists outweigh the positive x-ray interpretations by lesser qualified radiologists. Under Part 718, where the x-ray evidence is in conflict, consideration shall be given to the readers' radiological qualifications. Dixon v. North Camp Coal Co., 8 BLR 1-344 (1985). Thus, it is within the discretion of the administrative law judge to assign weight to x-ray interpretations based on the readers' qualifications. Goss v. Eastern Associated Coal Co., 7 BLR 1-400

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more weight than those of other physicians. Taylor v. Director, OWCP, 9 BLR 1-22 (1986).

(1984). Accordingly, great weight may be assigned to an x-ray interpretation of a B-reader. Aimone v. Morrison Knudson Co., 8 BLR 1-32 (1985). In addition, even greater weight may be assigned to an x-ray interpretation of a board-certified radiologist. Roberts v. Bethlehem Mines Corp., 8 BLR 1-211, 1-213 n. 5 (1985). In this case, the positive readings were by Drs. Simpao and Alexander. Moreover, Dr. Simpao's x-ray interpretation was re-read as negative by a doctor who is a B-reader and board-certified radiologist. Although Dr. Alexander is a B-reader and board-certified radiologist, his x-ray re-read was subsequently rehabilitated by Dr. Rosenberg. Conversely, Dr. Dahhan, a B-reader, interpreted his x-ray as negative for pneumoconiosis. Thus, one physician who is a board-certified radiologist and a B-reader re-read a positive x-ray as negative and additionally another B-reader found no existence of pneumoconiosis in an x-ray.

The record also contains more negative interpretations than positive. It is within the discretion of the administrative law judge to defer to the numerical superiority of the x-ray interpretations. Edmiston v. F & R Coal Co., 14 BLR 1-65 (1990). The United States Court of Appeals for the Sixth Circuit has confirmed that consideration of the numerical superiority of the x-ray interpretations, when examined in conjunction with the readers' qualifications, is a proper method of weighing x-ray evidence. Stanton v. Norfolk & Western Railway Co., 65 F.3d 55 (6th Cir. 1995) (citing Woodward v. Director, OWCP, 991 F.2d 314 (6th Cir. 1993)).

The August 13, 2002 positive x-ray was also read as negative by a physician of greater credentials. Furthermore, the November 21, 2002 x-ray was read as negative. Accordingly, I rely on the preponderance of negative readings by qualified physicians in finding that the Claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(2), a claimant may establish the existence of pneumoconiosis by biopsy or autopsy evidence. As no biopsy or autopsy evidence exists in the record, this section is inapplicable in this case.

Section 718.202(a)(3) provides that it shall be presumed that the miner is suffering from pneumoconiosis if the presumptions described in Sections 718.304, 718.305, or 718.306 are applicable. Section 718.304 is not applicable in this case because there is no evidence of complicated pneumoconiosis.

Section 718.305 does not apply because it pertains only to claims that were filed before January 1, 1982. Finally, Section 718.306 is not relevant because it is only applicable to claims of miners who died on or before March 1, 1978.

The fourth and final way to establish the existence of pneumoconiosis is set forth in Section 718.202(a)(4). This subsection provides for such a finding where a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis. Any such finding shall be based upon objective medical evidence and shall be supported by a reasoned medical opinion. A reasoned medical opinion is one which contains underlying documentation adequate to support the physician's conclusions. Field v. Island Creek Coal Co., 10 BLR 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. Id. Upon review of the medical opinion evidence, I find that the Claimant has not established the existence of pneumoconiosis.

Dr. Simpao, certified in Internal Medicine and Pulmonary Diseases, conducted a physical examination on August 13, 2002. (DX 15). He also performed a chest x-ray, pulmonary function test, and arterial blood gas study. He recorded that the Claimant was last employed with Shamrock Coal Company for nine years. He noted the Claimant smoked three years at a rate of one-half pack per day, quitting approximately twenty years ago. A medical history of the Claimant included heart bypass grafts in 1991 and 1997, and an indication that he wears a CPAP machine at night. Dr. Simpao's report stated that the Claimant suffered from sputum production of over one teaspoon daily, wheezing resting and on exertion, coughing, dyspnea, chest pains, orthopnea, ankle edema, and paroxysmal nocturnal dyspnea. A chest examination revealed "few crepitations with forced expiratory wheezes and inspiratory wheezes," "tactile fremitus increased right over left," and "increased resonance upper chest and axillary areas." An EKG showed a complete right bundle branch block with left axis deviation. Dr. Simpao diagnosed pneumoconiosis, based on a history of dust exposure, a positive x-ray finding, and a pulmonary function test along with physical findings and symptomatology. He further opined that the Claimant suffers from a mild impairment due to pneumoconiosis. He also stated that the Claimant is not able to perform the work of a coal miner or to perform comparable work in a dust free environment. Therefore, I find his report well-reasoned and well-documented.

Dr. Dahhan, certified in Internal Medicine and Pulmonary Diseases, conducted a physical examination on November 21, 2002. (EX 2-4). Additionally, he performed a chest x-ray, pulmonary function test, and arterial blood gas study. Dr. Dahhan recorded that the Claimant smoked three years quitting several years earlier and had a thirty year underground work history. His report noted that the Claimant suffered from a daily cough, sputum production, occasional wheezing, and dyspnea on exertion. A medical history included lumbar disc surgery and coronary bypass surgery in 1997. An EKG showed right bundle branch block with left anterior hemi-block. Dr. Dahhan opined the Claimant did not suffer from pneumoconiosis based on a normal chest examination, normal arterial blood gas analysis, non-qualifying pulmonary function studies, and a negative chest x-ray. He further stated the Claimant does not have any pulmonary disability due to coal dust and is capable of performing his previous coal mining work. He did note the Claimant suffered from coronary artery disease (post bypass surgery), lumbar disc disease (post surgery), and peptic ulcer disease none of which were caused by his coal dust exposure. At his deposition, Dr. Dahhan testified that the Claimant had extrinsic pulmonary restrictions that were due to his obesity, and he was able to make this finding because coal dust causes intrinsic restrictions. (EX 12). I find his report well-reasoned and well-documented.

Dr. Rosenberg, certified in Internal Medicine and Pulmonary Diseases, conducted a physical examination on February 18, 2004. (EX 1, 3). He ordered a chest x-ray, pulmonary function test, and arterial blood gas study. He recorded that the Claimant is a former smoker having smoked three years in the 1980s at a minimal rate. He also stated the Claimant reported a work history of thirty years with the last twenty as an underground repairman. His report noted that the Claimant suffered from shortness of breath, cough, sputum production, dyspnea on exertion, wheezing, and ankle swelling on the right side where vein graphs had been performed. Furthermore, the Claimant has problems sleeping and uses two pillows at night. A medical history showed coronary bypass surgery in 1992 and 1997 with a cholecystectomy in 2004. An EKG showed right bundle branch block with left axis deviation.

Dr. Rosenberg opined the Claimant did not suffer from pneumoconiosis. He relied on the results of the Claimant's pulmonary function tests and arterial blood gas analysis along with a negative x-ray and physical examination. Dr. Rosenberg

stated that the Claimant had a mild extrinsic restriction with normal oxygenation and no airway obstruction. He noted that because the Claimant's restriction was extrinsic it was due to his obesity and not his coal dust exposure. At his deposition, Dr. Rosenberg testified that the emphysema that he indicated on the Claimant's x-ray was not due to coal dust because there was no airway obstruction and no residual volume increase in the lungs. (EX 5). Dr. Rosenberg, in his report, opined the Claimant could perform his prior coal mine work or comparable arduous labor. However, he noted that the Claimant was limited because of his cardiac condition, especially his cardiomegaly, which was not caused by his coal dust exposure. In sum, I find his opinion well-reasoned and well-documented.

Pursuant to Section 718.201(a)(2), "legal pneumoconiosis" includes any chronic lung disease or impairment arising out of coal mine employment. This definition includes any chronic restrictive or obstructive pulmonary disease. Dr. Rosenberg diagnosed the Claimant with a mild extrinsic restriction. However, he did not indicate any disease that was chronic or arose out of the Claimant's coal mine work. Also, Dr. Barnett, in his x-ray report, noted chronic obstructive pulmonary disease and chronic bronchitis but failed to attribute either to the Claimant's coal dust exposure. (EX 9). As such, no physician of record diagnosed the Claimant with legal pneumoconiosis.

Accordingly, in weighing the well-reasoned, well-documented opinions of Drs. Simpao, Dahhan and Rosenberg, I find that the Claimant has not established by a preponderance of evidence the existence of pneumoconiosis. Dr. Simpao diagnosed the Claimant with clinical pneumoconiosis; however, both Drs. Dahhan and Rosenberg concluded that the Claimant did not suffer from pneumoconiosis. Therefore, the Claimant has failed to establish, by new evidence, the existence of pneumoconiosis. Thus, the Claimant has not shown a material change in condition.

Total Disability:

Total disability is defined as the miner's inability, due to a pulmonary or respiratory impairment, to perform his usual coal mine work or engage in comparable gainful work in the immediate area of the miner's residence. § 718.204(b). Total disability can be established pursuant to one of the four standards in Section 718.204(b)(2) or the irrebuttable presumption of Section 718.304, which is incorporated into Section 718.204(b). The presumption is not invoked here because

there is no x-ray evidence of large opacities classified as category A, B, or C, and no biopsy or equivalent evidence.

Where the presumption does not apply, a miner shall be considered totally disabled if he meets the criteria set forth in Section 718.204(b)(2), in the absence of contrary probative evidence. The Board has held that under Section 718.204(c), the precursor to § 718.204(b)(2), that all relevant probative evidence, both like and unlike, must be weighed together, regardless of the category or type, to determine whether a miner is totally disabled. Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195, 1-198 (1986); Rafferty v. Jones & Laughlin Steel Corp., 9 BLR 1-231, 1-232 (1987). Furthermore, the Claimant must establish this element by a preponderance of the evidence. Gee v. W.G. Moore & Sons, 9 BLR 1-4, 1-6 (1986).

Subsection (b)(2)(i) of § 718.204 provides for a finding of total disability where pulmonary function tests demonstrate $FEV_1$[6] values less than or equal to the values specified in the Appendix to Part 718 and such tests reveal FVC[7] or MVV[8] values equal to or less than the applicable table values. Alternatively, a qualifying $FEV_1$ reading together with an $FEV_1$/FVC ratio of 55% or less may be sufficient to prove disabling respiratory impairment under this subsection of the regulations. § 718.204(b)(2) and Appendix B. The record consists of three new pulmonary function studies dated August 13, 2002, November 21, 2002, and February 18, 2004. (DX 15; EX 1-2). Dr. Vuskovich found the August 13, 2002 study to be valid. (EX 7-8). All studies failed to produce qualifying values indicative of total disability.[9] Thus, I find the pulmonary function study evidence of record fails by a preponderance of the evidence to establish total disability under subsection (b)(2)(i).

Section 718.204(b)(2)(ii) provides for the establishment of total disability through the results of arterial blood gas

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[6] Forced expiratory volume in one second.

[7] Forced vital capacity.

[8] Maximum voluntary ventilation.

[9] The fact finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. Protopappas v. Director, OWCP, 6 B.L.R. 1-221 (1983). I find the Miner's height to be 68 inches.

tests. Blood gas tests may establish total disability where the results demonstrate a disproportionate ratio of $pCO_2$ to $pO_2$, which indicates the presence of a totally disabling impairment in the transfer of oxygen from the Claimant's lung alveoli to his blood. § 718.204(c)(2) and Appendix C. The test results must meet or fall below the table values set forth in Appendix C following Section 718 of the regulations. Three studies have been entered into the record as new evidence. (DX 15; EX 1-2). The studies dated November 21, 2002 and February 18, 2004 are non-qualifying pursuant to Section 718.105(c)(2). Dr. Vuskovich found the August 13, 2002 x-ray to be valid. (EX 7-8). This study conducted by Dr. Simpao produced non-qualifying values under the regulatory standards for disability. (DX 15). Therefore, I find that the blood gas study evidence of record fails to establish total disability under subsection (b)(2)(ii).

Total disability under Section 718.204(b)(2)(iii) is inapplicable because the Claimant failed to present evidence of cor pulmonale with right-sided congestive heart failure. Although Drs. Simpao, Dahhan, Rosenberg, and Alexander all indicated cor pulmonale on their respective x-ray interpretations, no physician additionally diagnosed right-sided congestive heart failure. (DX 15; CX 1; EX 1-2). Therefore, the Claimant did not prove total disability pursuant to this Section.

Finally, the Claimant establishes total disability under Section 718.204(b)(2)(iv). Where total disability cannot be established under subparagraphs (b)(2)(i), (b)(2)(ii) or (b)(2)(iii), Section 718.204(b)(2)(iv) provides that total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents the miner from engaging in his usual coal mine work or comparable gainful work.

Dr. Simpao diagnosed the Claimant with a mild respiratory impairment due to his pneumoconiosis. He also stated the Claimant does not retain the pulmonary capacity to perform his prior coal mine work. Dr. Simpao noted that he relied on a positive chest x-ray, EKG, and a pulmonary function test along with symptomatology and physical findings. (DX 15). A reasoned medical opinion is one which contains underlying documentation adequate to support the physician's conclusions. Field v. Island Creek Coal Co., 10 BLR 1-19, 1-22 (1987). As both the pulmonary function study and arterial blood gas analysis that

Dr. Simpao relies on are non-qualifying, I find his report is not well-reasoned and afford it less weight.

In his report, Dr. Dahhan stated the Claimant does not have any pulmonary disability due to coal dust and is capable of performing his previous coal mining work. (EX 2). He did note the Claimant suffered from coronary artery disease (post bypass surgery), lumbar disc disease (post surgery), and peptic ulcer disease none of which were caused by his coal dust exposure. At his deposition, Dr. Dahhan testified that the Claimant had extrinsic pulmonary restrictions that were due to his obesity, and he was able to make this finding because coal dust causes intrinsic restrictions. (EX 12). He based his findings on a normal chest examination, normal arterial blood gas analysis, non-qualifying pulmonary function studies, and a negative chest x-ray. I find his report well-reasoned and well-documented.

From his own examination, Dr. Rosenberg determined that the Claimant could perform his prior coal mine work or comparable arduous labor. (EX 1). He stated that the Claimant had a mild extrinsic restriction, and because the Claimant's restriction was extrinsic, it was due to his obesity and not his coal dust exposure. However, Dr. Rosenberg noted that the Claimant was limited because of his cardiac condition, especially his cardiomegaly, which was not caused by his coal dust exposure. He relied on the results of the Claimant's pulmonary function tests and arterial blood gas analysis along with a negative x-ray and physical examination. In sum, I find his opinion well-reasoned and well-documented.

In evaluating the medical opinions, the two well-reasoned and well-documented opinions from Drs. Dahhan and Rosenberg found that the Claimant was able to return to his prior coal mine employment, and thus was not totally disabled. In conclusion, I find the Claimant has failed to prove by a preponderance of the evidence total disability pursuant to Section 718.204. As such, he has not established a material change in condition.

Total Disability Due to Pneumoconiosis:

Assuming, arguendo, that the Claimant had established pneumoconiosis and total disability, the Claimant is nonetheless ineligible for benefits because he fails to show total disability due to pneumoconiosis as demonstrated by documented and reasoned medical reports. See § 718.204(c)(2). In interpreting this requirement, the Sixth Circuit has stated that

pneumoconiosis must be more than a de minimus or infinitesimal contribution to the miner's total disability. Peabody Coal Co. v. Smith, 127 F.3d 504, 506-507 (6th Cir. 1997). The well-reasoned and well-documented opinions of Drs. Dahhan and Rosenberg stated the Claimant does not have a totally disabling respiratory impairment. Therefore, I find that the Claimant has failed to establish total disability due to pneumoconiosis or a material change in condition.

Entitlement:

As the Claimant has failed to establish the existence of pneumoconiosis and total disability arising therefrom, I find that he has not established a material change in condition since his prior denial. Accordingly, the Claimant is not entitled to benefits under the Act.

Attorney's Fees:

The award of an attorney's fee under the Act is permitted only in cases in which the Claimant is found to be entitled to the receipt of benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any attorney's fees to the Claimant for legal services rendered in pursuit of benefits.

**ORDER**

It is thereby ORDERED that the claim of EARL SALYERS, JR. for benefits is hereby DENIED.

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DANIEL J. ROKETENETZ
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.